AMER RECORDS AND BRIEFS

No. 07-491

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

PIONEER RANCH LIMITED PARTNERSHIP AND ROBERT S. WHITING,
Petitioners,

v.

HOWARD MCDOUGALL AND CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Petitioners waived their right to request a jury trial by failing to make a proper demand under Federal Rule of Civil Procedure 38.

PARTIES TO THE PROCEEDING

Petitioner

Robert S. Whiting is the General Partner of the Pioneer Ranch Limited Partnership.

Pioneer Ranch Limited Partnership is a partnership formed under the laws of the State of Michigan.

Respondent

Central States, Southeast and Southwest Areas Pension Fund is a multi-employer pension benefit plan as defined by ERISA, 29 U.S.C. §§ 1002(2)(A) and 1002(37).

Howard McDougall is a member of the Board of Trustees of the Central States, Southeast and Southwest Areas Pension Fund which acts as the plan administrator of the Central States, Southeast and Southwest Areas Pension Fund within the meaning of ERISA, 29 U.S.C. § 1002(16)(B).

CORPORATE DISCLOSURE STATEMENT

Respondent does not have a parent corporation and no public company owns stock in Respondent.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
Petitioner	ii
Respondent	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. The Withdrawal of Whiting Distribution Services	1
B. The District Court Opinion	3
C. The Seventh Circuit Affirmed the District Court	4
REASONS FOR DENYING THE PETITION	5
A. The Defendants had Waived the Right to a Jury Trial	5
B. There Is No Compelling Reason To Grant Pioneer Ranch's Petition	6
CONCLUSION	9

TABLE OF AUTHORITIES

CASES	Page
188 LLC v. Trinity Indus., Inc., 300 F.3d 730 (7th Cir. 2002)	5
American Const. Co. v. Jacksonville, T. & K.W. Ry. Co., 148 U.S. 372, 13 S.Ct. 758 (1893)	7
Atlas Roofing Company, Inc. v. Occupational Safety and Health Review Commission, 430 U.S. 442, 97 S.Ct. 1261, 51 L.Ed.2d 464 (1977)	8
Bd. Of Trs. Of W. Conference of Teamsters Pension Trust Fund v. Thompson Bldg. Materials, Inc., 749 F.2d 1396 (9th Cir. 1984)	7
Connors v. Ryan's Coal Co., 923 F.2d 1461 (11th Cir. 1991)	7
Curtis v. Loether, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974)	7
Granfinanciera, S.A. v. Norberg, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989)	8
In Re Crysen/Montenay Energy Co., 226 F.3d 160 (2nd Cir. 2000)	5
Lau Ow Bew, 141 U.S. 583, 12 S.Ct. 43 (1891)	6
Lorillard v. Pons, 434 U.S. 575, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978)	7
McDougall v. Pioneer Ranch Ltd. Partnership, 494 F.3d 571 (7th Cir. 2007)	4, 7
U.S. v. Moore, 340 U.S. 616, 71 S.Ct. 524 (1951)	6
Young v. City of Mount Rainer, 238 F.3d 567 (4th Cir. 2001)	5

TABLE OF AUTHORITIES—Continued

STATUTES

	Page
29 U.S.C. §§ 1001-1461	2
29 U.S.C. § 1002(2)(A)	ii
29 U.S.C. § 1002(16)(B)	ii
29 U.S.C. § 1002(37)	ii
29 U.S.C. § 1301	5
29 U.S.C. § 1301(a)(1)	4, 7
29 U.S.C. § 1301(b)(1)	2

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STATEMENT OF THE CASE

A. The Withdrawal of Whiting Distribution Services .

The Central States, Southeast and Southwest Areas Pension Fund and Howard McDougall, one of its trustees, (collectively, the "Pension Fund") filed a Complaint on October 13, 2005 to collect withdrawal liability from Pioneer Ranch Limited Partnership ("Pioneer Ranch") and Robert S. Whiting, its general partner (collectively, the "Defendants") pursuant to the Employee Retirement Income Security Act of

1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1001-1461. (R.1.)[1] Specifically, an entity by the name of Whiting Distribution Services, Inc. ("Whiting Distribution") was a participating employer in the Pension Fund until December, 2003 at which time it ceased operations and filed a petition in bankruptcy thereby triggering a complete withdrawal from the Pension Fund. (R. 26 Ex. B ¶¶ 7-8, 10-11.) On the date of Whiting Distribution's withdrawal from the Pension Fund, Robert S. Whiting was the sole shareholder of Whiting Distribution. (R. 26 Ex. A ¶10.) During this same period, Robert S. Whiting, his wife Elaine, and four of their children together owned 97.11 percent of the profit interest of Pioneer Ranch. (R. 26 Ex. A ¶¶11-22.) Because Section 1301(b)(1) of MPPAA, 29 U.S.C. § 1301(b)(1), extends an employer's withdrawal liability to all trades or businesses which are under common control with the withdrawing employer, the Pension Fund alleged that Pioneer Ranch and Whiting Distribution are trades or businesses under common control which are jointly and severally liable for Whiting Distribution's withdrawal liability. (R. 1 ¶ 26.) Because Pioneer Ranch is a limited liability partnership, and because Robert S. Whiting was a general partner, the liability extends personally to Mr. Whiting. (R. 1 ¶ 33.) In the Complaint, the Pension Fund sought to collect the entire unpaid withdrawal liability assessment, interest, the greater of doubled interest or liquidated damages, attorney's fees and costs. (R. 1.)

On November 14, 2005, Defendants filed an answer to the complaint which included a jury demand.

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[1] "R.___" refers to the "USCA7 ____" pagination used for the record on appeal in the Seventh Circuit.

(R. 11.) On April 27, 2006, the district court granted Plaintiffs Motion For Leave to file a First Amended Complaint. (R. 20.) On May 17, 2006 Defendants' filed their First Amended Answer and said answer did **not** contain a jury demand . (R. 22) In their First Amended Answer, the Defendants admitted to all of the elements of the Pension Fund's claim, but denied the status of Pioneer Ranch as a trade or business. (R. 22 ¶ 26.) The Defendants claimed instead that Pioneer Ranch is a retreat and vacation home. (R. 22 ¶ 30.)

B. The District Court Opinion .

On July 20, 2006, the district court entered a Memorandum Opinion and Order granting Plaintiffs' Motion For Summary Judgment, and denying the Defendants' Motion for Summary Judgment. (R. 43; S.A. A-2.) In so ruling, the district court noted that the fact that Pioneer Ranch was organized as a limited partnership with a stated business purpose "conclusively establishes that the Pioneer Ranch operated a ranching business designated to produce income or profit." (R. 43 8; S.A. A-2, 8.) The court went on to note that Pioneer Ranch's tax returns provide strong evidence that Pioneer Ranch constituted a trade or business and that the "continuous, sophisticated employment practices" undercut any self-serving assertion that Pioneer Ranch was merely an estate planning device or a family retreat. (R. 43 9-10; S.A. A-2 9-10.) As a result, on September 29, 2006, the District Court entered a judgment in favor of the Pension Fund and against the Defendants in the amount of $4,558,184.20. (R. 46; S.A. A-16.) On October 11, 2006, the Defendants filed a Notice of Appeal. (R. 49.)

C. The Seventh Circuit Affirmed the District Court .

Robert S. Whiting and Pioneer Ranch appealed to the Seventh Circuit and presented the same arguments which they raised in the District Court. The Seventh Circuit first addressed the issue of the appropriate standard of review and concluded that the clearly erroneous standard of review applies when the only issue before the district court is the characterization of subsidiary facts and where the party does not have a right to a jury trial. *McDougall v. Pioneer Ranch Ltd. Partnership*, 494 F.3d 571, 575-78 (7th Cir. 2007). The Court went on to hold that, because there was no dispute over the underlying facts, it was necessary to determine whether Pioneer Ranch and Robert S. Whiting were entitled to a jury trial. *Id.*

The Seventh Circuit held that the clearly erroneous standard of review was appropriate because neither Pioneer Ranch nor Robert S. Whiting were entitled to a jury trial. *Id.* The Court noted that the general rule in ERISA cases is that there is no right to a jury trial and that, although 29 U.S.C. §1301(a)(1) provides for both legal and equitable remedies in the case of multiemployer pension plan disputes, the few courts that have considered the question determined that the Seventh Amendment does not guarantee a jury in these types of cases. *Id.* The Court went on to affirm the decision of the district court holding that the court did not commit clear error in holding that Pioneer Ranch was a trade or business liable for the withdrawal liability of Whiting Distribution Services. *Id.* at 580.

REASONS FOR DENYING THE PETITION

A. The Defendants had Waived the Right to a Jury Trial:

Even if this Court were to determine that the Seventh Amendment guarantees the right to a jury trial on the issue of whether a party is an employer for the purposes of 29 U.S.C. § 1301, Pioneer Ranch and Robert S. Whiting had waived the right to a jury trial. On April 27, 2006, the district court granted Plaintiffs Motion For Leave to file a First Amended Complaint. (R. 20.) The Defendants' filed their First Amended Answer on May 17, 2006 which contained no jury demand. (R. 22) In fact, the Answer published in Appendix D of Pioneer Ranch's Petition for Writ of Certiorari was superseded on April 27, 2006 giving it no legal effect when the Pension Fund filed a First Amended Complaint alleging a new cause of action. It is a general rules that, "an amended pleading ordinarily supersedes the original and renders it of no legal effect." *Young v. City of Mount Ranier*, 238 F.3d 567, 571 (4th Cir. 2001) *quoting In Re Crysen/Montenay Energy Co.*, 226 F.3d 160, 162 (2nd Cir. 2000); *see also 188 LLC v. Trinity Indus., Inc.*, 300 F.3d 730, 736 (7th Cir. 2002) (same). On May 16, 2006, the Defendant's filed their Answer to the First Amended Complaint (attached hereto as Appendix A) and no demand for a jury trial was made. As such, Pioneer Ranch and Robert S. Whiting cannot now claim that they were entitled to a jury trial under the Seventh Amendment based upon a demand found only in a superseded pleading.

Under Federal Rule of Civil Procedure 38, "[A]ny party may demand a trial by jury of an issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time

after the commencement of the action and not later than 10 days after service of the last pleading directed to such issue. . .". The Pension Fund's First Amended Complaint was filed on April 27, 2006. Thereafter, neither Pioneer Ranch nor Robert S. Whiting made a demand for a jury trial. Neither Pioneer Ranch nor Robert S. Whiting ever argued to the district court that they were entitled to a jury trial. The first time the Defendant's ever mentioned that they felt they were entitled to a jury demand was in their Reply brief before the Seventh Circuit, and even then it was only a statement claiming they had made a jury demand without an explanation. In fact, the Seventh Circuit made mention of this fact in its opinion, when it stated that both parties had made deficient arguments regarding whether Pioneer Ranch was entitled to a jury trial. (Page 7a of Petitioners Appendix A). Central States had never addressed the issue because the Defendant's had never made a jury demand nor had they argued that they were entitled to a jury trial up to that point.

As such, even if this Court were to determine that a party is entitled to a jury trial for causes of action under MPPAA, here the right to a jury trial was waived when neither Pioneer Ranch nor Robert S. Whiting made demand for a jury trial. *See U.S. v. Moore*, 340 U.S. 616, 621, 71 S.Ct. 524 (1951).

B. There Is No Compelling Reason To Grant Pioneer Ranch's Petition .

Ever since this Court's decision in *Lau Ow Bew*, 141 U.S. 583, 12 S.Ct. 43 (1891), the Court has exercised great restraint in granting certiorari. The power has been sparingly used and reserved for cases of "peculiar gravity and general importance" or "to

secure uniformity of decision." *American Const. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 383, 13 S.Ct. 758 (1893). The Defendant's case satisfies neither requirement and satisfies none of the "compelling reasons" listed in Supreme Court Rule 10. There is no conflict between the circuit courts on any issue raised by the Defendants. Moreover, no important federal question was decided in a way which conflicts with decisions from this Court.

The Seventh Circuit in its opinion directly addressed the fact that there is agreement among the Circuit Courts of Appeal on the issue of whether the Seventh Amendment guarantees a right to a jury trial in cases under 29 § 1301(a)(1). *Pioneer Ranch*, 494 F.3d at 576. The Court notes that its decision is directly in line with the other two Circuits which had addressed the issue. *Id. citing Connors v. Ryan's Coal Co.*, 923 F.2d 1461 (11th Cir. 1991) *and Bd. Of Trs. Of W. Conference of Teamsters Pension Trust Fund v. Thompson Bldg. Materials, Inc.* 749 F.2d 1396 (9th Cir. 1984).

Pioneer Ranch and Robert S. Whiting in their Petition for Writ of Certiorari argue that their petition should be granted based upon this Court's rulings in *Lorillard v. Pons*, 434 U.S. 575, 577, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978) and *Curtis v. Loether*, 415 U.S. 189, 195, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974). However, *Lorillard* and *Curtis* are inapplicable to the case at hand. Both *Lorillard* and *Curtis* dealt with the enforcement of statutory rights in ordinary civil actions in the district courts. *Lorillard*, 434 U.S. at 575; *Cutis*, 415 U.S. at 189. MPPAA, however, requires entities challenging assessments of withdrawal liability to do so in an arbitration proceeding. This Court has held that "[W]hen Congress creates

new statutory 'public rights,' it may assign their adjudication to an administrative agency . . . without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'" *Atlas Roofing Company, Inc. v. Occupational Safety and Health Review Commission*, 430 U.S. 442, 455, 97 S.Ct. 1261, 51 L.Ed.2d 464 (1977); *see also Granfinanciera, S.A. v. Norberg*, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989). The suit against Pioneer Ranch and Robert S. Whiting was brought under the enforcement provisions of MPPAA and contemplated a cause of action which never existed at common law and thus the Seventh Amendment is inapplicable.

Granting Pioneer Ranch and Robert S. Whiting's petition will not "secure uniformity of decision" since there is no split of authority among the Circuit Courts of Appeal regarding the issues involved and no important question of federal law has been decided by the Seventh Circuit which conflicts with decisions from this Court. Accordingly, the Defendants' petition should be denied.

CONCLUSION

Pioneer Ranch and Robert S. Whiting's petition has no merit and it should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 05C 5908

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and HOWARD MCDOUGALL, TRUSTEE

Plaintiffs,

v.

PIONEER RANCH LIMITED PARTNERSHIP, a Michigan limited partnership, and ROBERT S. WHITING, an individual,

Defendants.

DEFENDANTS' ANSWER TO FIRST AMENDED COMPLAINT

Defendants, Pioneer Ranch Limited Partnership, a Michigan Limited Partnership, and Robert S. Whiting, Individually, answer the Complaint and plead affirmative defenses as follows:

JURISDICTION AND VENUE

1. This is an action for collection of withdrawal liability, interest, and penalties incurred by an employer as a result of a withdrawal from a multiemployer pension plan.

ANSWER: Admitted.

2. This action arises under the Employee Re-

tirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980, ("MPPAA"), 29 U.S.C. §§ 1001-1461. This Court has jurisdiction over this action under sections 502(e), 502(f), and 4301(c) of ERISA, 29 U.S.C.§ § 1132(e), 1132(f) and 1451(c).

ANSWER: Paragraph 2 states a series of legal conclusions to which answers are not required. Defendants admit that the action purports to be based on the statutory provisions identified in Paragraph 2.

3. Venue lies in this Court under sections 502(e)(2) and 4301(d) of ERISA, 29 U.S.C. 5§ 1132(e)(2) and 1451(d), in that the Central States, Southeast and Southwest Areas Pension Fund is administered at its principal place of business in Rosemont, Illinois.

ANSWER: Admitted that venue is appropriate in this Court. Defendants further contend that venue is appropriate in the Western District of Michigan, where both Defendants reside. Defendants contend that the cause should be transferred to the United States District Court for the Western District of Michigan pursuant to 28 U.S.C. § 1404(a).

PARTIES AND RELATIONSHIP

4. Plaintiff Central States, Southeast and Southwest Areas Pension Fund ("Pension Fund") is a multiemployer pension plan within the meaning of sections 3(37) and 4001(a)(3)of ERISA, 29 U.S.C. 55 1002(37) and 1301(a)(3). Plaintiff Howard McDougall is a present Trustee and a "fiduciary" of the Pension Fund and the Trustees are collectively the plan sponsor of the Pension Fund within the meaning of section 4001 (a)(10) of ERISA, 29 U.S.C. 1301(a)(10). The Trustees administer the Pension Fund at 9377 West Higgins Road, Rosemont, Illinois 60018.

ANSWER: Defendants lack knowledge and information sufficient to form a belief as to the truth of each of the allegations contained in Paragraph 4 of the Complaint.

5. Pursuant to sections 502(a)(3) and 4301(a)(1) of ERISA, 29 U.S.C. § 1132(a)(3) and 1451(a)(1), the Trustees are authorized to bring this action on behalf of the Pension Fund, its participants and beneficiaries for the purpose of collecting withdrawal liability.

ANSWER: Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5 of the Complaint.

6. Defendant Robert S. Whiting is an individual who is a citizen of the State of Michigan.

ANSWER: Denied as untrue. Robert S. Whiting died in February of 2006.

7. Defendant Pioneer Ranch is a Michigan limited partnership with its principal place of business located in the State of Michigan.

ANSWER: Admitted.

8. Whiting Distribution Services, Inc. ("Whiting") was a Michigan corporation with its principal place of business located in the state of Michigan.

ANSWER: Admitted.

CLAIM FOR RELIEF

9. Whiting was subject to a series of collective bargaining agreements between itself and various unions affiliated with the International Brotherhood of Teamsters, under which Whiting was required to make contributions to the Pension Fund on behalf of certain of its employees.

ANSWER: Admitted.

10. As of December 6, 2003, Robert S. Whiting owned at least 80% of the total combined voting power of all classes of stock of Whiting entitled to vote and/or at least 80% of the total value of shares of all classes of stock of Whiting.

ANSWER: Admitted.

11. As of December 6, 2003, Robert S. Whiting was a general partner and limited partner of Pioneer Ranch owning at least 30.62% of the profit interest of such partnership.

ANSWER: Admitted.

12. As of December 6, 2003, Elaine S. Whiting was a general partner and limited partner of Pioneer Ranch owning at least 26.01 °A of the profit interest of such partnership.

ANSWER: Admitted.

13. As of December 6, 2003 Robert S. Whiting and Elaine S. Whiting were married.

ANSWER: Admitted.

14. As a result of the attribution rule prescribed by 26 C.F.R. §1 .414(c)-4(b)(5)(i), Robert S. Whiting is considered to own the profit interest of Pioneer Ranch owned by Elaine S. Whiting.

ANSWER: The 'allegation contained in Paragraph 14 of the Complaint contains a legal conclusion to which no answer is required.

15. As of December 6, 2003 R. Scott Whiting was a child of Robert S. Whiting.

ANSWER: Admitted.

16. As of December 6, 2003 R. Scott Whiting owned at least, 10.12% of the profit interest of Pioneer Ranch.

ANSWER: Admitted.

17. As of December 6, 2003 Daniel L. Whiting was a child of Robert S. Whiting.

ANSWER: Admitted.

18. As of December 6, 2003 Daniel L. Whiting owned at least 10.12% of the profit interest of Pioneer Ranch.

ANSWER: Admitted.

19. As of December 6, 2003 Jo Ann Skandalaris was a child of Robert S. Whiting. ANSWER: Admitted.

20. As of December 6, 2003 Jo Ann Skandalaris owned at least 10.12% of the profit interest of Pioneer Ranch.

ANSWER: Admitted.

21. As of December 6, 2003 Jane Ann Whiting was a child of Robert S. Whiting.

ANSWER: Admitted.

22. As of December 6, 2003 Jane Ann Whiting owned at least 10.12% of the profit interest of Pioneer Ranch.

ANSWER: Admitted.

23. As a result of the attribution rule in 26 C.F.R. §1 .414(c)-4(b)(6), Robert S. Whiting is considered to own the profit interests in Pioneer Ranch of R. Scott

Whiting, Daniel L. Whiting, Jo Ann Skandalaris, and Jane Ann Whiting.

ANSWER: The allegation contained in Paragraph 23 of the Complaint states a legal conclusion to which no answer is required.

24. As of December 6, 2003 Robert S. Whiting owned at least 80% of the profit interest in Pioneer Ranch.

ANSWER: The allegation contained in Paragraph 24 of the Complaint states a legal conclusion to which no answer is required.

25. Whiting and Pioneer Ranch constitute a brother-sister group of trades or businesses under common control as defined by 26 C.F.R. §1.414(c)-3(c).

ANSWER: Denied as untrue.

26. Whiting and Pioneer Ranch and all trades or businesses under common control with them (the "Whiting Controlled Group") constitute a single employer within the meaning of Section 4001(b)(1) of ERISA, 29 U.S.C. § 1301(b)(1), and the regulations promulgated thereunder.

ANSWER: Denied as untrue.

27. The Whiting Controlled Group is the employer for purposes of the determination and assessment of withdrawal liability under Title IV of ERISA.

ANSWER: Denied as untrue.

28. The Pension Fund has determined that on or about December 6, 2003, Whiting permanently ceased to have an obligation to contribute to the Pension Fund, and thereafter, no member of the Whiting Controlled Group was obligated to contribute to the Pension Fund, thereby effecting a "complete with-

drawal" as defined in section 4203 of ERISA, 29 U.S.C. § 1383.

ANSWER: Defendants lack knowledge and information sufficient to form a belief as to the truthfulness of each of the allegations contained in Paragraph 28 of the Complaint.

29. As a result of this complete withdrawal, all entities constituting the Whiting Controlled Group, including Pioneer Ranch, incurred withdrawal liability to the Pension Fund in the amount of $3,708,184.81, as determined under section 4201(b) of ERISA, 29 U.S.C. 1381(b).

ANSWER: Denied as untrue.

30. On or about August 23, 2005, the Whiting Controlled Group, through the Pioneer Ranch Limited Partnership received a notice and demand for payment of withdrawal liability issued by the Pension Fund in accordance with sections 4202(2) and 4219(b)(1)of ERISA, 29 U.S.C. 1382 and 1399(b)(1). The notice and attached invoice notified Pioneer Ranch that it was required to discharge its liability in a lump sum or in 98 monthly payments of $49,363.29 beginning on October 1, 2005 and a final payment of $3,686.74 due on December 1, 2013.

ANSWER: Defendants admit that the notice was received. Defendants deny that Pioneer Ranch Limited Partnership is part of the "Whiting Controlled Group." The remaining factual obligations contained in Paragraph 30 are self-explanatory based upon the terms of the notice.

31. On January 10, 2006, the Pension Fund received a payment from the Whiting Controlled Group

representing past due interim withdrawal liability payments from October, 2005 through January, 2006

ANSWER: Defendants admit that the Pension Fund received a payment from Defendant Pioneer Ranch on or about January 10, 2006. Defendants deny that the payment was made by a member of the "Whiting Controlled Group." Defendants deny that the payment constituted a "past due" interim withdrawal payment because no payment was due from Pioneer Ranch or Robert S. Whiting.

32. On or about February 15, 2006, the Whiting Controlled Group received a notice from the Pension Fund, pursuant to Section 4219(c)(5)(A) of ERISA, 29 U.S.C. § 1399(c)(5)(A), that its withdrawal liability payments were once again past due, and which forewarned the Whiting Controlled Group of the consequences of their failure to pay such liability.

ANSWER: Defendants admit that a notice was received by Pioneer Ranch on or about February 15, 2006, as described above. Defendants deny that the notice was received by the "Whiting Controlled Group" because Pioneer Ranch is not a trade or business that comprises part of any "controlled group."

33. The Whiting Controlled Group has failed to make any additional withdrawal liability payments to the Pension Fund and is in default within the meaning of Section 4219(c)(5) of ERISA, 29 U.S.C. § 1399(c)(5).

ANSWER: Defendants admit that no additional withdrawal liability payments have been made. No payments are due because Pioneer Ranch is not a trade or business. In addition, it would be impossible for Defendants to make such payments.

34. Consequently, the Whiting Controlled Group is liable for the full amount of the withdrawal liability remaining due and owing pursuant to Section 4221 (b)(1) of ERISA, 29 U.S.C. § 1401 (b) (1).

ANSWER: Denied as untrue.

WHEREFORE, Defendants request this Court to enter Judgment in favor of Defendants and against Plaintiffs finding no cause of action.

Defendants further request the Court to order that Plaintiffs are entitled to an award of their attorney fees and costs in defending this action.

HOWARD & HOWARD ATTORNEYS, P.C.

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AFFIRMATIVE DEFENSES

1. Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund is not a proper Plaintiff in this action because it lacks standing.

2. Defendant, Pioneer Ranch Limited Partnership has no liability because it is not an employer as defined by 29 U.S.C. § 1301(b)(1).

3. Defendant, Pioneer Ranch Limited Partnership is not a trade or business for the purpose of ERISA.

4. Defendant, Pioneer Ranch Limited Partnership has no liability because it is not part of a "Controlled Group" with Whiting Transport as defined by Title 29.

5. Robert Whiting is not a proper party because he is deceased.

6. Robert Whiting and the Estate of Robert Whiting have no liability in this matter because Pioneer Ranch has no liability.

7. This matter should be transferred to the United States District Court for the Western District of Michigan, where Robert Whiting lived, where his estate is in probate, where all real property is located, and where virtually all fact witnesses in this case reside.

8. The amounts sought in this Complaint are the subject of accord and satisfaction in bankruptcy based upon the resolution of contested issues.

HOWARD & HOWARD ATTORNEYS, P.C.

Date: May 17, 2006

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